No. 90-5635

In The

Supreme Court of the United States

October Term, 1990

JOHN J. McCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

This case presents a single question: whether, through the operant phrase "prisoner petitions challenging conditions of confinement," Congress intended to authorize the non-consensual referral of prisoner complaints alleging a single unconstitutional episode of excessive force. In our opening brief, we suggested that by far the most natural reading of the statutory language was to limit such references to "complaints concerning ongoing practices or circumstances" – complaints that, by their very nature, are "subject to redress by appropriate injunctive relief." Pet. Br. 13-14. We further demonstrated that, while the legislative history of the prisoner-petitions clause was essentially silent on its meaning, interpreting the language in the manner we suggest conforms with Congress's general objective of lessening the burdens of the district court while being alert to the constitutional limitations on the delegation of judicial authority to magistrates. In particular, since (as respondents now concede) Congress did not empower magistrates to conduct jury trials in cases referred without the parties' consent, it seems highly unlikely that it intended to authorize non-consensual assignment of an entire class of cases for which the prisoner is entitled under the Seventh Amendment to trial by jury.

Respondents' brief does not adequately address any of these issues. Endorsing the minority view in the courts of appeals, they suggest that the prisoner-petitions clause should be read to cover "all grievances occurring during prison confinement" other than "those seeking postconviction relief." Resp. Br. 13 (internal quotations omitted). As the following sections discuss, that interpretation reflects (1) a strained view of the relevant language; (2)

an erroneous reading of the legislative history; (3) a misunderstanding of the relevance of the Seventh Amendment; and (4) an overstated assessment of the practical consequences of the interpretation we advance.

1. Respondents correctly assert that "[i]n deciding an issue of statutory construction, the Court must begin with the language of the statute itself" – and then proceed to ignore that basic directive. Resp. Br. 10 (citations and internal quotations omitted). To be sure, the phrase "conditions of confinement" is not entirely self-defining. Nonetheless, were this case to be decided on the basis of language alone, surely the better interpretation is to read "conditions of confinement" as referring to ongoing practices or circumstances as opposed to an isolated, fully consummated event. More specifically, wherever the outer limits of the definition may be, it stretches the ordinary meaning of the phrase beyond recognition to suggest that a guard, by virtue of using tear gas on one prisoner on one occasion, creates a "condition of confinement."

Because the statutory language itself so clearly tips in favor of the interpretation we suggest, it is respondents, not petitioner, who must bear the burden of demonstrating that Congress did not mean what it said. None of respondents' textual arguments, however, even begin to accomplish that end. Thus, for example, they suggest weakly that standard dictionaries offer numerous definitions for the word "condition." Not surprisingly, however, respondents can provide not a single example of a definition that supports the interpretation they advance. Similarly, respondents concede that a host of statutes – both state and federal – employ the phrase "conditions of

confinement" in a manner inconsistent with the meaning they would prefer. Their only rejoinder is that, read in context, some (but not all) of those statutes make clear that they are addressed primarily to more general concerns, *e.g.*, unconstitutional "conditions" created by a "pattern or practice" of state action. 42 U.S.C. § 1997a.[1] But that too only begs the question. The fact remains that on every occasion in which Congress has used the phrase "conditions of confinement" it was referring to pervasive, ongoing circumstances within a jail or prison as opposed to a single, isolated event.[2]

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[1] Even 42 U.S.C. § 1997a does not support their view. In that provision, Congress authorized the Attorney General to initiate civil suits seeking injunctive relief to remedy certain unlawful "conditions" in state institutions. 42 U.S.C. § 1997a; *see also id.* § 1997c. That Congress authorized the Attorney General to take such extraordinary steps only where the unconstitutional conditions are created or maintained by state actors "pursuant to a pattern or practice of resistance to the full enjoyment of [constitutional or statutory] rights, privileges, or immunities," 42 U.S.C. § 1997a, by no means suggests that Congress used the word "condition" in a way consistent with respondents' view. *See* Resp. Br. 12 n.9.

[2] For the most part, respondents do not even address the numerous decisions of this Court that have (1) used the phrase "conditions of confinement" to describe ongoing, pervasive circumstances or (2) explicitly distinguished such challenges from excessive-force claims. Pet. Br. 15-16. Their only citation in this regard is to *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *Preiser*, however, is of little help to respondents. To begin with, there is no evidence in the legislative history of the Magistrates Act that Congress was even aware of the decision – much less that it patterned the statute after it. More important, *Preiser* in

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Nor does the statutory context of the prisoner-petitions clause suggest a different interpretation. Noting that the language immediately preceding the clause authorizes reference of "applications for posttrial relief made by individuals convicted of criminal offenses," 28 U.S.C. § 636(b)(1)(B), respondents suggest that, in combination, the clauses are intended to sweep in the entire universe of prisoner litigation. But that is simply not the case, as one can readily think of examples of prisoner litigation that fall into neither category – *e.g.*, a claim that the prisoner was injured in the course of his arrest. Even under respondents' broad interpretation, such cases would be excluded.

Finally, respondents contend that it is petitioner who is stretching the plain meaning of § 636(b)(1)(B) by suggesting that the phrase in question refers to "injunctive actions" – language that is "plainly absent" from the statute. Resp. Br. 11. That suggestion, however, misses the

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no way indicates that "conditions" cases include complaints based on isolated incidents. *Preiser* held only that prisoners challenging the fact or duration (as distinct from the conditions) of their confinement could not escape the exhaustion requirement of the federal habeas statutes by filing the claim under 28 U.S.C. § 1983. Because the only question presented was whether a challenge to a reduction in good-time credits was cognizable under § 1983, the Court had no occasion to define the contours of the "conditions" cases alluded to in dictum. Indeed, all of the decisions cited by the Court as examples of such cases involved claims that are consistent with the definition of "conditions of confinement" we advance. *See* 411 U.S. at 498-99.

point. We readily acknowledge that, to the extent references under the prisoner-petitions clause are limited to claims for injunctive relief, it is because of background concerns associated with the Seventh Amendment, not an express congressional directive. Nonetheless, as a window to understanding Congress's intent, the Seventh Amendment is an extremely helpful interpretive device – particularly since it serves only to confirm the more natural reading of the statutory language: Given the clarity of the jury-trial right in specific-episode, damages actions, it is surely the more sensible approach to resolve any ambiguity in the phrase "prisoner petitions challenging conditions of confinement" in a manner that is sensitive to this concern. Understanding the phrase to be a rough proxy for actions that seek, and are appropriate for, injunctive relief – a class of cases that plainly does not include damages actions predicated on a single unconstitutional episode – accomplishes this objective while remaining faithful to the language of the Act. In contrast, the interpretation urged by respondents does neither.[3]

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[3] In this regard, one point in our opening brief requires clarification. We recognize that there will be some complaints in which prisoners seek to enjoin an ongoing, pervasive condition of confinement but which also include an ancillary damages claim – *e.g.*, a class action seeking an injunction to improve the quality of the food, in which some members of the class contend that they are entitled to damages for the health problems suffered as a consequence of their poor nutritional or caloric intake. We suggest that such cases are likely to be exceedingly rare – respondents cite none – if for no other reason than that the damages claim will frequently drop out on qualified immunity grounds. When such cases actually do go

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2. Given that the statutory language, at the very least, tips in favor of petitioner, respondents can prevail only if they can find some evidence in the history or purposes of the provision that suggests a contrary intent. Respondents have done neither.

As noted previously, specific reference to the prisoner-petitions clause in the legislative history is exceedingly sparse and largely unhelpful. Lacking any explicit evidence of congressional intent, respondents place principal reliance on statistics compiled by the Administrative Office of the United States Courts (AO) and reproduced in tabular form in the House and Senate Reports accompanying the 1976 amendments. Resp. Br. 16-18. Pointing out that the statistical table contains an entry entitled "prisoner petitions," and observing that this category is "not further subdivided into those [petitions] arising from specific incidents and those arising from ongoing or pervasive conduct," Resp. Br. 16, respondents contend that Congress therefore intended to

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to trial on both the legal and equitable claims, however, we acknowledge that they are appropriate for reference under the prisoner-petitions clause, subject, of course, to a valid jury-trial demand. For the reasons given in text, the phrase "prisoner petitions challenging conditions of confinement" – in conjunction with the background Seventh Amendment concerns – does suggest that Congress was referring to injunctive actions challenging ongoing practices or circumstances. As the above example makes clear, however, the fit is not entirely perfect. Thus, by force of the statutory language, an otherwise classic "conditions case" is appropriate for referral even if the plaintiff includes an associated damages claim. To the extent our initial brief implied otherwise, *see* Pet. Br. 27 n.23, we were incorrect.

allow reference to magistrates of all prisoner actions relating to confinement.

The inference respondents seek to derive from these statistics is unsupportable. The category of "prisoner petitions" in the AO statistics cited in the legislative reports is entirely undifferentiated, including both prisoner civil rights actions and petitions for habeas corpus. *See* 1976 Annual Report of the Director of the Administrative Office of the United States Courts at 427 (Table M-4) ("1976 Annual Report"). (Indeed, of the 8,231 "prisoner petitions" handled by magistrates in 1976, the vast majority – roughly three out of four – were habeas petitions. *Ibid.*) Accordingly, the major premise of respondents' argument collapses: the phrase "prisoner petitions" in the AO table describes a different category of cases than does the same phrase in the statute itself – which excludes applications for post-conviction relief. The absence of a further breakdown in the AO statistics therefore proves nothing.[4]

In the absence of more concrete evidence of Congress's intent, respondents take refuge in what they view as the general purpose of the 1976 amendments – to "broaden the authority of magistrates to assist judges in handling an ever-increasing volume of cases." Resp. Br. 15. That unquestionable intent, however, is equally consistent with the reading of § 636(b)(1)(B) advanced by petitioner. The difference between respondents' reading

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[4] Nor would it make any sense to subdivide a category of cases that is composed primarily of habeas petitions into "specific episode" and "conditions" subcategories: habeas matters simply cannot be subdivided in that way.

of the prisoner-petitions clause and ours is simply a matter of degree: it is a difference over how far, not whether, Congress intended to broaden the role of magistrates. Moreover, it is an oversimplification to suggest that any interpretation that results in more cases being referred to federal magistrates is necessarily consonant with Congress's purposes. To the contrary, in broadening the authority of magistrates, Congress was also attentive to the constitutional limits on the exercise of that authority. *See* Pet. Br. 25-27. Interpreting the prisoner-petitions clause in the manner we suggest reflects and reconciles these mixed congressional aims; respondents' view exaggerates one aim while completely ignoring the other.

Moreover, our interpretation unquestionably *does* have the effect of relieving district judges of a significant portion of the burden of prisoner litigation – a fact that is easy to lose sight of in the mass of statistics adduced by respondents. We do not contend, for example, that references under the prisoner-petitions clause are limited to class actions. Thus, the statistics respondents offer in that regard are quite beside the point. Even were that the appropriate focus, however, it is well to remember precisely what lies behind these numbers. Because class actions seeking prison reform can span many years, and involve lengthy and complex class-certification, liability, remedy and compliance phases, the savings in judicial resources from referring one such case to a magistrate – everything else being equal – will likely be far greater than the savings resulting from the reference of even several simple damages actions based on isolated events.[5]

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[5] Nor are respondents correct in asserting that prisoner class actions were "clearly" not a cause for congressional

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In any event, even in "specific-episode" cases, magistrates would still be able to spare district judges many (and, typically, all) of the most time-consuming burdens associated with prisoner litigation. The vast majority of prisoner civil rights cases are resolved prior to trial – typically on motions to dismiss or for summary judgment (often on immunity grounds) or upon a finding that the complaint is "frivolous" under 28 U.S.C. § 1915(d). *See* 1990 Annual Report of the Director of the Administrative Office of the United States Courts, App. I, at 49 (Table C5B) (of 24,478 prisoner lawsuits involving civil rights claims terminated in fiscal year 1990, 23,510 – or 96% – were resolved prior to trial); *see also Cleavinger v. Saxner*, 474 U.S. 193, 207-08 (1985) (noting that "the vast majority of prisoner cases are resolved on the complaint alone").[6] Thus, even under our reading, magistrates would dispose of most prisoner litigation (including specific-episode cases) pursuant to their authority under § 636(b)(1)(A)

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concern in 1976. Resp. Br. 17. Indeed, the very same AO Annual Report relied on by Congress for its statistical table and cited by respondents shows that prisoner class actions (including those brought under the habeas statutes) formed a rapidly growing category of cases. Between 1973 and 1976, the number of prisoner class actions pending in the federal courts nearly doubled, rising from 322 to 630. 1976 Annual Report at 213.

[6] Respondents contend that during fiscal year 1990, magistrates "wrote reports and recommendations and helped judges to dispose of 13,132 prisoner petitions pursuant to 28 U.S.C. § 636(b)." Resp. Br. 18 (citing 1990 Annual Report, App. I, Table M-4A). These statistics, however, do not reveal what portion of those dispositions could have been made under the magistrate's "dispositive motions" power under § 636(b)(1)(B).

and the "dispositive motions" portion of § 636(b)(1)(B). Moreover, for those few cases that do survive pre-trial motions practice, even respondents concede that the prisoner can avoid trial before a magistrate by the simple ~~expedient~~ of making a timely jury demand. Resp. Br. 19. For that reason as well, the number of cases that actually will be affected if our position prevails is, as a practical matter, quite small.[7]

In sum, neither the legislative history nor the general purposes of the Act provides any reason for disregarding the clear import of the statutory language. Moreover, as we now explain, respondents have no persuasive answer to our contention that the constitutional backdrop against which § 636(b)(1)(B) was enacted – an important element of any inquiry into legislative purpose – militates strongly against the strained interpretation they propose.

3. Respondents acknowledge that the Seventh Amendment jury-trial right places a significant limitation on the power to make non-consensual referrals pursuant to the prisoner-petitions clause. *See* Resp. Br. 19 ("Nor do respondents dispute the contention that a magistrate cannot conduct nonconsensual evidentiary hearings and make recommended findings and conclusions under § 636(b)(1)(B) when a prisoner has a right to have his case tried by a jury and has properly exercised that right."). They nonetheless resist the more general conclusion – already evident on the face of the statute – that Congress intended to limit such referrals to a class of cases in

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[7] In addition, some cases will be referred consensually pursuant to § 636(c), as this case was initially.

which that right is generally not implicated. None of the arguments they advance in this regard has merit.

To begin with, their suggestion that the "right to a jury trial is not an issue in this case" misses the point. Resp. Br. 19 n.17. As noted previously, "[t]he issue in this case is not whether the statute is unconstitutional as applied, but *how best to interpret Congress's intent*." Pet. Br. 24 n.19 (emphasis added). On that central question, it is surely appropriate to consider the degree to which various interpretations of the language would frustrate a fundamental constitutional right. More particularly, it seems highly unlikely that Congress intended to authorize the non-consensual reference of a class of cases for which the jury-trial right so clearly attaches without making some explicit provision for assuring that the right will be vindicated.

Nor is it at all significant that Seventh Amendment concerns can be avoided by the simple expedient of honoring a prisoner's timely jury demand. In essence, respondents' position is that Congress wrote a statute that, by its express terms, allows courts to refer cases for trial before a magistrate against the prisoner's will – but omitted to include any mention of the fact that the prisoner, usually acting *pro se*, could completely defeat the reference if he only knew enough to request a jury. We doubt very much that Congress intended such a subterfuge. At the very least, it is inappropriate to assume such an intent in the absence of some clear indication in the legislative history.[8]

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[8] Such an intent is particularly unlikely in light of the care Congress took elsewhere in the Act to assure that litigants are

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4. All of respondents' remaining arguments orient around the contention that interpreting the Act in the manner we suggest would be "unworkable" and "would lead to unreasonable results." Resp. Br. 24. As with the suggestion that our interpretation would unduly burden district courts, *see supra* pp. 8-10, respondents' concerns are either unwarranted or overstated.

Respondents' principal contention is that the line between "specific-episode" and true "conditions" cases blurs at the edges and, for that reason, will be difficult and time-consuming to administer. This concern – which rests in part on a misunderstanding of our position – is highly exaggerated. As an initial matter, it is simply wrong to suggest that "[d]istrict court judges would have to conduct a preliminary inquiry just to determine whether a prisoner petition could be referred to a magistrate." Resp. Br. 26. As with any other pre-trial matter, that judgment could be made by the magistrate pursuant to his or her authority under 28 U.S.C. § 636(b)(1)(A) – just as, even under respondents' interpretation, the magistrate would need to identify those prisoner suits that, under any theory, fall outside § 636(b)(1)(B) (*e.g.*, a claim that the prisoner suffered injuries at the time of arrest).

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aware of their rights to avoid reference to a magistrate. Thus, under 28 U.S.C. § 636(c)(2), the clerk of the court gives notice to the parties of "their right to consent" to trial before a magistrate. "Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to [such] reference." *Ibid.*

Nor is the line itself particularly hard to draw, as evidenced by the numerous decisions in this and other contexts that have preserved the distinction between "specific-episode" cases and those that challenge some aspect of a prisoner's "conditions of confinement." Pet. Br. 14-17 & nn. 9 & 11. At bottom, the interpretive task is no more complicated than distinguishing between a fully consummated event and an ongoing (or recurrent) circumstance or practice.[9] Moreover, while cases in the latter category are, by definition, appropriate for injunctive relief, the distinction does not turn on the nature of the relief actually sought in the complaint. If a prisoner who allegedly was the victim of simple assault inappropriately includes a claim for injunctive relief, the magistrate can readily dismiss the claim pursuant to his or her pre-trial authority under § 636(b)(1)(A). At that point, the case is either over (in the event no other relief was sought) or is readily and unambiguously identifiable as the kind of simple damages action that is not within the purview of the prisoner-petitions clause. Conversely, in those rare cases where prisoners are seeking to enjoin an ongoing or recurrent constitutional violation, but also have a valid damages claim for their associated injuries, the case is properly referable as a "prisoner petition[] challenging

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[9] While the prototypical "conditions" case challenges a practice that affects at least a segment of the prison population as a whole, Pet. Br. 18, a case may still qualify for referral under the prisoner-petitions clause even if the challenged practice is not pervasive or generalized – *e.g.*, a claim by an individual prisoner that he has been provided, and continues to be provided, unconstitutionally inadequate food.

conditions of confinement." *See supra* n.3.[10] As these examples make plain, there is nothing mystifying or particularly difficult about enforcing the distinction we propose.[11]

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[10] Respondents also propose a class of cases in which the complaint is predicated on a specific incident but the petitioner seeks only an injunction. Resp. Br. 20 n.19. In fact, they have found no case that fits that description. (Their citation to *Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963), *rev'd*, 378 U.S. 546 (1964) (per curiam), *later appeal*, 382 F.2d 518 (7th Cir. 1967), is incorrect, since the prisoner there was challenging ongoing conditions.) In any event, even if there were such a case, the appropriate disposition would be dismissal for failure to state a claim.

[11] Respondents attempt to make much of the fact that petitioner's *pro se* complaint alluded to certain generally applicable prison regulations and included a claim for injunctive relief. Far from showing that the interpretation we propose is untenable, however, the handling of his claim serves only to demonstrate how easy it is to apply. To begin with, the reference to the regulations in the complaint is far from clear. Read in context, most of the references appear to be: (1) part of petitioner's comprehensive account of the underlying events; (2) associated with his apparent view that he had an independent state-law claim for violation of an administrative regulation (J.A. 21); or (3) offered to address the question whether petitioner was tear-gassed "in a good faith effort to maintain or restore discipline" rather than "maliciously or sadistically for the very purpose of causing harm." J.A. 46 (citations and internal quotations omitted). In any event, to the extent he was seeking injunctive relief associated with the regulations, J.A. 23, he was not entitled to it, *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (Among other things, by the time of trial, petitioner had been transferred to another prison, *see* J.A. 25, thereby mooting any equitable challenge to CCIS's general policies.); and, presumably for that reason, the claim had effectively been eliminated from the case by the time of trial. *See*

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Respondents' final contention is that it makes no sense to allow magistrates to decide cases challenging ongoing prison conditions, while requiring that cases founded on a specific episode of misconduct be resolved by an Article III judge. Since conditions cases are "more serious," they contend, such an allocation is incongruous. Resp. Br. 16, 26-27. For several reasons, the argument is unpersuasive. The most serious flaw, of course, is the assumption that conditions cases are "more serious" than those involving isolated incidents. To the extent that constitutional claims lend themselves to hierarchical ranking at all, it would be surprising to conclude that a claim challenging a policy of "double bunking" was more significant than one alleging that guards killed an inmate with unconstitutionally excessive force. Even accepting the dubious assumption that conditions cases are more "serious," the incongruity respondents allege is overstated. A federal judge may properly refer all pre-trial matters to a magistrate in *any* prisoner lawsuit – referrals that, historically, have resulted in the final disposition of some 96% of all such cases. *See supra* pp. 9-10. And, as respondents themselves readily concede, even in a specific-episode case, the prisoner can guarantee trial before an Article III judge simply by demanding a jury. In short, the incongruity respondents allege finds no basis in fact

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J.A. 25 (making clear in pre-trial ruling that the only issue to be tried was whether "defendants violated [McCarthy's] constitutional rights when they sprayed him with 'Big Red,' a chemical weapon similar to mace"); *see also* J.A. 29.

or reason. Much less is there any evidence that Congress drafted the statute with this concern in mind.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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